

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

HAHN T. LUONG,

Plaintiff,

v.

MICHAEL J ASTRUE,  
Commissioner of Social Security,

Defendant.

CASE NO. C06-1756-MJB<sup>1</sup>

MEMORANDUM OPINION

Plaintiff Hahn Luong, appeals to the District Court from a final decision of the Commissioner of the Social Security Administration (the “Commissioner”) denying her application for Supplemental Security Income benefits under Title XVI of the Social Security Act. For the reasons set forth below, the Commissioner’s decision shall be REVERSED and this matter REMANDED for further administrative proceedings.

# I. PROCEDURAL HISTORY

Plaintiff filed an application for Supplemental Security Income (“SSI”) benefits on March 20, 2003. Tr. 17, 70-73. Plaintiff alleged that she became unable to work in April, 2000, based on nervousness and depression. Tr. 70. Her application for benefits was denied initially (Tr. 28-31) and on reconsideration (Tr. 34-35). On Plaintiff’s timely request, a hearing was held on

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<sup>1</sup>Pursuant to the consent of the parties, this case has been referred to the undersigned in accordance with 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and Local Rule MJR 13.

1 September 21, 2005, before Administrative Law Judge (“ALJ”) Verrell Dethloff. Tr.17. Plaintiff  
2 was represented by counsel and testified at the hearing. Tr. 269-273. Plaintiff’s son also testified  
3 at the proceedings. Tr. 274-279. The ALJ issued a decision on June 14, 2006, finding that  
4 Plaintiff was capable of performing her past relevant work as a cook’s helper and thus, not  
5 disabled within the meaning of the Social Security Act. Tr. 25. The Appeals Council denied  
6 Plaintiff’s request for review on October 27, 2006, making the ALJ’s decision the final decision  
7 of the Commissioner. Tr. 6-10. Plaintiff timely filed her appeal with this Court.

## 8 II. THE PARTIES’ POSITIONS

9 Plaintiff requests that the Court reverse the Commissioner’s decision and remand for  
10 award of benefits. Plaintiff argues that the ALJ erred by: (1) failing to credit Plaintiff’s  
11 testimony; (2) failing to provide specific and legitimate reasons for assigning “no significant  
12 weight” to the opinions of Dr. Vuong and Dr. Washburn; and (3) concluding that Plaintiff is  
13 capable of performing her past relevant work as cook’s helper, a job with a medium exertional  
14 level. Defendant responds that the Court should affirm the Commissioner’s final decision  
15 because it is supported by substantial evidence and is free of legal error.

## 16 III. STANDARD OF REVIEW

17 The court may set aside the Commissioner’s denial of social security disability benefits  
18 when the ALJ’s findings are based on legal error or not supported by substantial evidence in the  
19 record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is  
20 defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence  
21 as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*,  
22 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving  
23 conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
24 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one rational interpretation,

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1 it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639,  
2 642 (9th Cir. 1982).

#### 3 IV. EVALUATING DISABILITY

4 The claimant bears the burden of proving that he is disabled. *Meanel v. Apfel*, 172 F.3d  
5 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial  
6 gainful activity by reason of any medically determinable physical or mental impairment, which  
7 can be expected to result in death, or which has lasted or can be expected to last for a continuous  
8 period of not less than twelve months. 42 U.S.C. § 423 (d)(1)(A).

9 The Social Security regulations set out a five-step sequential evaluation process for  
10 determining whether claimant is disabled within the meaning of the Social Security Act. *See* 20  
11 C.F.R. § 416.1520. At step one, the claimant must establish that he or she is not engaging in any  
12 substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the claimant  
13 must establish that he or she has one or more medically determinable severe impairments or  
14 combination of impairments. If the claimant does not have a "severe" impairment, he or she is  
15 not disabled. *Id.* at § (c). At step three, the Commissioner will determine whether the claimant's  
16 impairment meets or equals any of the listed impairments described in the regulations. A  
17 claimant who meets one of the listings is disabled. *See Id.* at § (d).

18 At step four, if the claimant's impairment neither meets nor equals one of the impairments  
19 listed in the regulations, the Commissioner evaluates the claimant's residual functional capacity  
20 and the physical and mental demands of the claimant's past relevant work. *Id.* at § (e). If the  
21 claimant is not able to perform his or her past relevant work, the burden shifts to the  
22 Commissioner at step five to show that the claimant can perform some other work that exists in  
23 significant numbers in the national economy, taking into consideration the claimant's residual  
24 functional capacity, age, education, and work experience. *Id.* at § (f); *Tackett v. Apfel*, 180 F.3d

1 1094, 1100 (9th Cir. 1999). If the Commissioner finds the claimant is unable to perform other  
2 work, then the claimant is found disabled.

### 3 V. SUMMARY OF THE RECORD EVIDENCE

4 Plaintiff was 60 years old at the time of her initial hearing before the ALJ. She has  
5 completed two years of college. Tr. 116. Plaintiff's prior work experience included fifth grade  
6 teacher in Vietnam, work-study job at college, and cook's helper. *Id.* Plaintiff last worked in  
7 2000. Tr. 78. She asserts that "her boss/employers told her not to work any more because of  
8 dizziness and she fell down twice while she was working at a restaurant." *Id.* Plaintiff also  
9 asserts that she had to take leave from work 1-2 days a week due to headaches. *Id.* Other  
10 evidence relevant to Plaintiff's allegations is incorporated into the discussion below.

### 11 VI. THE ALJ'S DECISION

12 At step one, the ALJ found that Plaintiff has not engaged in substantial gainful activity  
13 since the alleged onset of her disability. Tr. 19. At step two, he found that Plaintiff has the  
14 following severe impairment: depression. *Id.* At step three, the ALJ found that Plaintiff does not  
15 have an impairment or combination of impairments that meets or medically equals one of the  
16 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. Tr. 21. The ALJ found that  
17 the Plaintiff retains the residual functional capacity to perform the full range of exertional  
18 demands at all levels of the occupational base, and non-exertionally, she retains the capacity to  
19 understand, recall and execute simple instructions, carry out repetitive activities, respond to  
20 changes in the workplace, and deal with co-workers and supervisors. Tr. 21-22. In reaching his  
21 decision, the ALJ found that Plaintiff's statements about the intensity, duration, and limiting  
22 effects of her impairment were not entirely credible. Tr.22-23. At step four, the ALJ found that  
23 Plaintiff is able to perform her past relevant work as a cook's helper, both as she previously  
24 performed this job and as it is generally performed in the national economy. Tr. 24-25. Thus, the

ALJ concluded that Plaintiff has not been under a “disability,” as defined in the Social Security Act, at any time through the date of the decision. Tr. 25.

## VII. DISCUSSION

### A. PHYSICIANS’ OPINIONS

Plaintiff claims that the ALJ did not provide specific and legitimate reasons for assigning “no significant weight” to the opinions of her treating physician, Dr. Vuong, and her examining psychologist, Dr. Washburn. Plaintiff argues that, instead, the ALJ erroneously relied on two reviewing psychologists, whose opinions are entitled to less weight than those of the treating and evaluating doctors. Dkt. #11 at 9-12. Defendant contends that the ALJ correctly weighed the opinions of Dr. Vuong and Dr. Washburn.

As a general rule, more weight should be given to the opinion of treating and examining doctors than to the opinion of nonexamining doctors. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). To reject an uncontradicted opinion of a treating or examining doctor, an ALJ must state clear and convincing reasons that are supported by substantial evidence. *Id.* If a treating or examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ may reject it by providing specific and legitimate reasons that are supported by substantial evidence. *Id.*; see also *Andrews*, 53 F.3d at 1043; *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). In the present case, because the record reflects that the ALJ gave greater weight to the reviewing physicians’ opinions about Plaintiff’s ability to work, the “specific and legitimate” standard is applicable.

#### 1. Dr. Vuong

Dr. Vuong treated Plaintiff from 1991-92 and then from September 2002 to the present. Tr. 181-191, 220-245. Dr. Vuong twice gave an opinion regarding Plaintiff’s ability to work. First, in a note dated September 9, 2002, Dr. Vuong certified that Plaintiff had been under her

1 care for headache, dizziness, sleep disturbances, and probably depression, and she also opined  
2 that Plaintiff is “not able to work during the next six months.” Tr. 188. In a second note dated  
3 December 8, 2005, Dr. Vuong certified that she was treating Plaintiff for headache, sleep  
4 disturbances, low back pain, osteoporosis, and post herpetic neuralgia, and she again opined that  
5 Plaintiff “is unable to work in the next 6 months.” Tr. 256.

6 The ALJ found that this opinion evidence from Dr. Vuong was entitled to no persuasive  
7 weight. Tr. 23. The ALJ reasons for rejecting Dr. Vuong’s opinion were: (i) neither note  
8 offered any narrative explanation for limiting Plaintiff from the entire work world based upon the  
9 listed conditions, and (ii) neither note referred to or contained any objective evidence, such as x-  
10 ray reports, MRI studies, bone scans or laboratory data to clinically correlate the plaintiff’s  
11 reported symptoms. *Id.*

12 Plaintiff argues that the ALJ’s reasons are incorrect because Dr. Vuong’s certifications of  
13 disability cannot be read in isolation from the rest of Plaintiff’s chart, which reflect Dr. Vuong’s  
14 evaluation and observation of Plaintiff over many years. *See* Dkt. #11 at 10. However, the  
15 treating physician’s opinion on the ultimate issue of disability is not necessarily conclusive.  
16 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). Further, an ALJ may discredit treating  
17 physicians’ opinions that are conclusory, brief, and unsupported by clinical findings. *Id.*

18 Here, Dr. Vuong’s opinions that Plaintiff was unable to work were both conclusory and  
19 brief. Additionally, the medical records from Dr. Vuong only reflect a chronological report of  
20 Plaintiff’s symptoms and treatments, and do not include any explanations or support for Dr.  
21 Vuong’s opinions that the Plaintiff was unable to work. Moreover, the treatment records from  
22 Dr. Vuong contain no evidence of objective testing that demonstrates any significant limitations  
23 on Plaintiff’s physical and mental capacity to do substantial gainful activity. Accordingly, this  
24 Court concludes that the ALJ properly rejected Dr. Vuong’s disability opinion on the basis of

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1 specific and legitimate reasons supported by substantial evidence.

2 2. Dr. Washburn

3 Dr. Washburn conducted psychological evaluations of Plaintiff in 2002, and he diagnosed  
4 her with major depression and anxiety. Tr. 169-80. In April 2002, Dr. Watson opined that  
5 Plaintiff's "poor delayed memory and poor visual and auditory concentration is severe enough to  
6 prevent her from performing satisfactorily in any employment." Tr. 174 (emphasis in original).  
7 In May 2002, Dr. Washburn concluded that Plaintiff has poor auditory and visual concentration  
8 and attention, she would have difficulty following directions and assimilating information, and  
9 she would have difficulty working a full day because of headaches and depression. Tr. 179.

10 In finding that Plaintiff's severe impairment is depression, the ALJ expressly  
11 acknowledged Dr. Washburn's diagnosis of Plaintiff's depression in 2002. Tr. 19. However, the  
12 ALJ failed to mention Dr. Washburn's opinions regarding the impact of Plaintiff's impairments  
13 on her ability to work. The ALJ must consider all relevant evidence and may not select  
14 and discuss only that evidence that favors his ultimate conclusion. *See Herron v. Shalala*,  
15 19 F.3d 329, 333 (7th Cir. 1994); *see also Young v. Secretary of Health and Human Services*,  
16 957 F.2d 386, 393 (7th Cir. 1992) (ALJ must articulate his reason for rejecting evidence "within  
17 reasonable limits" in order for meaningful appellate review). Here, the ALJ does not state what  
18 weight, if any, he accorded to Dr. Washburn's opinion that Plaintiff is unable to work.  
19 Accordingly, this Court finds that the ALJ erred in failing to evaluate Dr. Washburn's  
20 disability opinion.

21 3. Nonexamining Doctors

22 Plaintiff argues that the ALJ erred in relying on the opinions of the two reviewing  
23 psychologists, Dr. Peterson and Dr. Eisenhauer. Dkt. #11 at 12. Plaintiff contends that "[o]nly  
24 the reviewing psychologists are of the opinion that Plaintiff can maintain a pace at work on a  
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1 sustained basis -- an opinion inconsistent with all the medical evidence.” *Id.*

2 In August 2003, Dr. Eisenhower completed a Mental RFC Assessment form and a  
3 Psychiatric Review Technique form based on his review of evidence in Plaintiff’s file. Tr. 201-  
4 217. Dr. Peterson later affirmed Dr. Eisenhower’s assessments on both forms. Tr. 201, 205.  
5 These reviewing doctors opined that Plaintiff’s symptoms are not expected to impose greater  
6 than moderate limitations and that Plaintiff remains able to work. *See* Tr. 203.

7 In describing his consideration of the reviewing doctors’ opinions, the ALJ initially noted  
8 that Drs. Eisenhower and Peterson had concluded that Plaintiff’s depression was not severe  
9 enough to preclude all work activity. Tr. 23. The ALJ also highlighted the following narrative  
10 summary from the reviewing doctors’ assessment of Plaintiff’s mental RFC:

11 This woman is the caretaker off [sic] her paraplegic husband, is stressed and  
12 depressed. Her [activities of daily living] are intact and overall so is her mental  
status.

13 She is oriented with intact memory. She is goal directed. The claimant is able to  
14 understand, recall and execute simple instructions, can understand and recall  
15 detailed ones, but will have difficulty with the execution of detailed tasks due to  
16 variable concentration. While ongoing symptoms of anxiety and depression  
17 reduce extended concentration and tolerance of work stress, it is not to the extent  
of completely inhibiting the claimant from carrying out repetitive instructions  
within an average work schedule and work week. The symptoms are not expected  
to impose greater than moderate limitations, as the claimant is able to take care of  
herself, run her household and take care of her disabled husband.

18 There is no indication of a lack of social skills or otherwise socially inappropriate  
19 behavior. The claimant remains able to work with others and able to respond  
appropriately to supervisors.

20 The claimant remains able to adapt to changes on the job.

21 Tr. 23-24 (citation omitted). The ALJ concluded that these opinions of Drs. Eisenhower and  
22 Peterson were entitled to determinative weight on the issue of Plaintiff’s residual functional  
23 capacity to perform work-related activities. Tr. 24. The ALJ indicated that he gave persuasive  
24 weight to their opinions because: (i) there is no credible medical evidence to contradict these

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1 findings, and (ii) there is no objective medical data to indicate an impairment of greater severity  
2 than outlined in [their] reports. *Id.*

3 This Court concludes that although the ALJ articulated specific reasons for giving greater  
4 weight to the reviewing physicians' opinions, his reasons are neither legitimate nor supported by  
5 substantial evidence. As noted in the discussion in subsection 2 *supra*, the ALJ failed to address  
6 Dr. Washburn's opinion that Plaintiff would have difficulty working a full day due to her  
7 depression and headaches. Not only did Dr. Washburn identify a greater level of impairment  
8 than outlined in the opinions of the two reviewing physicians,<sup>2</sup> but also, Dr. Washburn based his  
9 opinion on examination and objective testing of Plaintiff's mental health. Thus, because neither reason  
10 was a specific and legitimate reason supported by substantial evidence in the record, the ALJ  
11 erred by giving greater weight to Dr. Peterson's and Dr. Eisenhower's opinions on this basis.

#### 12 B. PLAINTIFF'S CREDIBILITY

13 Plaintiff argues that the ALJ erred by failing to credit her testimony. Defendant asserts  
14 that the ALJ correctly weighed Plaintiff's testimony in determining her residual functional  
15 capacity.

16 If a claimant has established an underlying impairment which reasonably could be  
17 expected to produce the alleged subjective complaints and there is no evidence of malingering,  
18 the ALJ must provide clear and convincing reasons for rejecting the claimant's testimony. See  
19 *Smolen v. Charter*, 80 F.3d 1273, 1281 (9th Cir. 1996). General findings are insufficient; rather,  
20 the ALJ must identify what testimony is not credible and what evidence undermines the

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22 <sup>2</sup> For example, while Dr. Washburn states that Plaintiff's ability to understand, remember  
23 and follow complex instructions is markedly limited (Tr. 171), the reviewing doctors state that it  
24 is moderately limited (Tr. 201). Similarly, while Dr. Washburn concludes that Plaintiff's ability to  
25 respond to and tolerate work pressures and expectations of a normal work setting is severely  
26 limited (Tr. 177), the non examining doctors state that Plaintiff is only moderately limited in her  
ability to complete a normal workday and work week (Tr. 201).

1 claimant's complaints. *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993); *Varney v. Sec'y of*  
2 *Health and Human Servs.*, 846 F.2d 581, 584 (9th Cir. 1988) (Varney I). In assessing  
3 credibility, the ALJ may consider, for example: 1) ordinary techniques of credibility evaluations,  
4 such as the claimant's reputation for lying and prior inconsistent statements concerning the  
5 symptoms; 2) unexplained or inadequately explains failure to seek treatment or to follow a  
6 prescribed course of treatment; 3) the claimant's daily activities; and 4) medical evidence tending  
7 to discount the severity of subjective claims. *Rollins v. Massanari*, 261 F.3d 853, 856-57 (9th  
8 Cir. 2001).

9 Here, the ALJ accurately described Plaintiff's testimony at the hearing. Tr. 22.  
10 However, the ALJ found that Plaintiff's statements concerning the intensity, duration and  
11 limiting effects of her impairments are not entirely credible. Tr. 23. He identified two reasons  
12 for not fully crediting Plaintiff's testimony: (1) her alleged limitations are self-imposed  
13 restrictions which are not supported by the medical evidence; and (2) her activities of daily living  
14 have not been profoundly compromised by her depression, as evidenced by the ability to maintain  
15 a home, shop, cook, attend temple services on a regular basis, socialize, exercise, and care for  
16 her disabled husband. Tr. 22. Each of the ALJ's reasons are addressed below.

17 1. Objective Medical Evidence

18 The ALJ stated that Plaintiff's claimed level of limitations were not supported by any  
19 medical evidence. Tr. 22. However, as previously noted, the ALJ has not considered Dr.  
20 Washburn's diagnosis of Plaintiff's disability in assessing her level of limitations. Dr. Washburn  
21 conducted a clinical evaluation of the Plaintiff's mental status and concluded that  
22 she has poor concentration and attention, that she has problems following directions and  
23 assimilating information and that she would be unable to work a full day because of her  
24 headaches and anxiety. Tr. 179. These conclusions are not inconsistent with Plaintiff's claimed  
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1 level of disability. Hence, the ALJ's first reason was not a clear and convincing basis for  
2 rejecting Plaintiff's credibility.

3 2. Plaintiff's Daily Activities

4 The ALJ noted that Plaintiff's testimony at the hearing contrasted with her periodic daily  
5 activities reports. Tr. 22. Specifically, the ALJ stated:

6 In contrast to this testimony at the hearing, the claimant in her periodic daily  
7 activities reports said that she cooked and took care of the house and her family  
8 and got the kids ready for school. Her husband said that she liked to cook and  
9 keep things clean, and that she like to stay home and cook for her family. She  
10 was said to talk with some frequency with friends on the phone, and visited an  
11 acupuncturist on a regular basis, and she and her husband sometimes did the  
shopping together. She visited with friends and family. She also described, or  
had it described for her, dizziness and an inability to always finish a project, but in  
general her activities of daily living were self described as being performed most  
times.

12 Tr. 22 (citing Exhibits 5E and 7E).

13 Yet, careful review of the record shows that the ALJ based these findings, in part, on an  
14 incomplete, unsigned, and undated daily activities report (Tr. 98-102), and on his selective  
15 reading of completed daily activities reports that were signed by Plaintiff and her husband in  
16 February and April 2003 (Tr. 90-95, 111-115). In her February 2003 daily activities report,  
17 Plaintiff stated that her son does all the vacuuming and she cannot do laundry because she  
18 forgets to put the detergent. Tr. 91. Plaintiff also indicated that when she goes grocery  
19 shopping with her husband, he makes the list and that when she sees too many people she  
20 sometimes she stands outside and just her husband does the grocery shopping. *Id.* In the  
21 remarks section of the daily activities report, Plaintiff states that before she could do everything  
22 and now she cannot do most things. Tr. 93. These statements are consistent with her  
23 testimony.<sup>3</sup> Additionally, these statements were also corroborated by Plaintiff's son's testimony.

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24 <sup>3</sup>Plaintiff testified that she stopped working because she was having problems with  
25 dizziness. Tr. 270. During the day, she walks around the house and she helps her 16-year-old

1 Tr. 274-277.

2 Moreover, while the ALJ noted Plaintiff's statement from the incomplete daily activities  
3 report that she cooks lunch and dinner once everyday, he did not acknowledge her followup  
4 explanation that when she gets dizziness or headaches she lets her children eat fast food 2-3  
5 times a week. Tr. 98. Similarly, the ALJ noted Plaintiff's husband's statement that she cooks  
6 food for the family and takes care of the house, but the ALJ did not mention her husband's  
7 statement that Plaintiff is weak and cannot do these household chores. *See* Tr. 113. Further,  
8 though the ALJ indicated that Plaintiff gets her children ready for school, Plaintiff actually stated  
9 that on a normal day she "wake[s] up child" and the "child goes to school on own." Tr. 98.  
10 Thus, when read in their entirety, the daily activities reports are consistent with the plaintiff's  
11 testimony. Accordingly, this Court finds that the ALJ erred in rejecting Plaintiff's testimony on  
12 this basis.

### 13 C. PAST RELEVANT WORK

14 Plaintiff argues that ALJ erred in concluding that she is capable of performing her past  
15 relevant work as a cook's helper, a job with a medium exertional level. Plaintiff claims that:

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17 (1) she has no past relevant work, and (2) she does not have the residual function capacity to  
18 perform medium level work as a cook's helper.

19  
20 son cook when he comes home from school. *Id.* She also indicated that her son cleans the house.  
21 *Id.* Plaintiff stated that she does not clean the house because she has headaches frequently (Tr.  
22 270), and she does not vacuum because she cannot hold the vacuum cleaner (Tr. 271). Plaintiff  
23 also testified that her son does the laundry because she forgets to put in the detergent or does not  
24 know how to turn the dial, and she does not cook when she is alone at home because she forgot  
25 to turn off the burner one time and there was a fire. Tr. 272. Plaintiff stated that she visits the  
26 temple once a week or once every two weeks. *Id.* Plaintiff further indicated that she does not  
have a driver's license because she feels dizzy if she sits in the car and she is scared even when  
someone is driving her someplace. Tr. 273.

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1 Past relevant work is work that the claimant has done in the past 15 years, that lasted  
2 long enough for the claimant to learn to do it, and was substantial gainful activity. 20 C.F.R. §  
3 416.965(a). In the present case, the record reflects that Plaintiff worked as a cook's helper from  
4 1997 to March 2000. Tr. 79, 103. Therefore, her past work clearly satisfies the first two  
5 components of past relevant work. Thus, the focus here is whether Plaintiff's past work  
6 constituted substantial gainful activity (SGA).

7 1. Substantial Gainful Activity

8 Substantial gainful activity is work done for pay or profit that involves significant mental  
9 or physical activities. *Lewis v. Apfel*, 236 F.3d 503, 515 (9th Cir. 2001) (citing 20 C.F.R. §§  
10 404.1571- 404.1572 & 416.917-416-975). Earnings can be a presumptive, but not conclusive  
11 sign of whether a job is substantial gainful activity. *Id.* Regulation §§ 404.1547(b),  
12 404.1575(c), 416.974(b) and 416.975(c) provide for evaluation of work in terms of *average*  
13 monthly earnings. SSR 83-35 (emphasis in original). If an employee's average monthly  
14 "countable earnings" exceed the Earnings Guidelines, the employee will ordinarily be found  
15 engaged in SGA. *Id.*; *see also* 20 C.F.R. §§ 404.1574(b)(2) & 416.974(b)(2) (from January  
16 1990-June 1999 monthly earnings averaged more than \$500; from July 1999 - December 2000  
17 monthly earnings averaged more than \$700). If average monthly earnings are equal to or less  
18 than these amounts, then it shows that claimant has not engaged in substantial gainful activity.  
19 *See* 20 C.F.R. §§ 404.1574(b)(3) & 416.974(b)(3).

20 Plaintiff contends that her past work as a cook's helper does not constitute SGA because  
21 her average monthly earnings have never exceeded approximately \$500. Dkt. #11 at 12.  
22 Defendant responds that Plaintiff's past work was SGA because Plaintiff's reported earnings  
23 reflect that she averaged more than \$500 per month in 1998, a fact noted by Plaintiff in her  
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opening brief.<sup>4</sup> See Dkt. #13 at 13.

Earnings are generally averaged over the actual period of time in which work was performed. SSR 83-35. However, when an employee's earnings or work activities vary somewhat from month-to-month, it may be necessary to average the "countable earnings" reported over a number of months in order to compare those earnings with the applicable monthly amount in the Earnings Guidelines. *Id.* Generally, such earnings are to be averaged over the entire period of work requiring evaluation. However, it will be necessary to average separately the distinct periods of work involved where there is a regulatory change in the SGA earnings level or there is a significant change in work patterns or earnings.

Here, Plaintiff's period of work extends from 1997 through March 2000.<sup>5</sup> As noted above, different SGA earnings levels applied during this period. Assuming, for sake of argument, that Plaintiff began working in January 1997, her monthly earnings through June 1999 averaged \$396, and the SGA level was \$500. Then from July 1999 through March 2000, Plaintiff's monthly earnings averaged \$874, and the SGA level was \$700. Thus, Plaintiff's income during this latter period exceeded the level of presumptive substantial gainful activity, and accordingly her work as a cook's helper constitutes past relevant work.

## 2. Plaintiff's RFC to Perform Past Relevant Work

Plaintiff argues that the ALJ erred in determining that she could do her past relevant work as a cook's helper as she performed it before and as it is performed in the economy. Plaintiff initially claims that she cannot perform work as a cook's helper because of her physical condition - 60 years old, 4'7" in height and under 100 pounds. However, age and body habitus

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<sup>4</sup>In describing her earnings in her opening brief, Plaintiff states: "In her highest-earning year, 1998, she averaged only \$507 per month." Dkt. #11 at 3.

<sup>5</sup>Plaintiff's yearly earnings were as follows: 1997 - \$3,430.50; 1998 - \$6,090.75; 1999 - \$4,743.75; and 2000 - \$5,491.25. Tr. 75.

(i.e. natural body build, physique, constitution, size, and weight) insofar as they are unrelated to individual's medically related impairments and related symptoms, are not factors in assessing RFC in initial claims. SSR 96-8p, available at 1996 WL 374184\*2. Rather, the residual functional capacity finding must be based only on plaintiff's impairment. *Id.* In the present case, Plaintiff's claimed impairment is her depression and not her physical condition. Thus, her physical condition cannot be considered a factor in determining her RFC.

Furthermore, the ALJ's conclusion about Plaintiff's RFC is based on his evaluation of Plaintiff's credibility and the medical evidence on record. In light of the discussion in sections A and B *supra*, the ALJ will need to fully evaluate Dr. Watson's disability opinion and re-evaluate Plaintiff's credibility on remand. Because such re-evaluations would necessarily impact the determination of Plaintiff's RFC and whether or not she can work at a medium level of exertion, this court need not further evaluate this issue, which is best addressed on remand as it is the ALJ who is responsible for weighing the evidence and resolving ambiguities in the record. *See Andrews*, 53 F.3d at 1039.

## VII. CONCLUSION

The Commissioner's determination to deny Plaintiff SSI benefits is not supported by substantial evidence and is not free of legal error. Therefore, the Court REVERSES the Commissioner's decision and REMANDS this matter for further administrative proceedings, consistent with above discussion.

DATED this 24<sup>th</sup> day of July, 2007.



MONICA J. BENTON  
United States Magistrate Judge